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VIA E-MAIL

Honorable Ross Johnson, Chairman
and Commissioners Remy Huguenin, Leidigh and Hodson
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Prenotice Regulation 18503.31 Construing Section 85303

Dear Chairman Johnson and Commissioners:

I write on behalf of the California Democratic Party (CDP) regarding the Commission's Prenotice Regulation 18503.31 interpreting Government Code section 85303(c).

On behalf of CDP, I wish to express my strong opposition to the prenotice regulation as drafted. The regulation is expressly contrary to the plain meaning of Government Code section 85303(c). Moreover, the Commission has failed to establish any record that would support a finding that the prenotice regulation is reasonably necessary. As such, the regulation would not be in compliance with the Administrative Procedures Act which provides that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Government Code section 11342.2) Ultimately, if adopted, the regulation would not withstand a legal challenge.

CDP urges the Commission to not adopt the prenotice regulation and instead adopt a regulation consistent with that proposed by Charles Bell in his letter of September 10, 2007. By doing so the Commission would correctly interpret the language in 85303(c) that only limits contributions that are "used for purposes other than making contributions to candidates."

In my letter to you of June 12, 2007, I provided a brief historical review of how the question of interpreting 85303(c) had evolved over time. While I will not repeat all of that history here, some key points are worth noting again.

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When voters adopted Proposition 73 in 1988, they enacted nearly identical language to that now found in section 85303(c).¹ That language allowed committees to accept unlimited contributions if those contributions were used for purposes other than making contributions to candidates. Through advice letter, the Commission concluded that fundraising expenses were for "purposes other than making contributions to candidates for elective state office." (*Eldred Advice Letter*, FPPC Advice Letter No. A-89-038)

When Proposition 208 was approved in 1996 imposing contribution limits upon candidates and committees, the initiative contained no exemption from the contribution limits for committees which raised money "for purposes other than making contributions to candidates" similarly to that found in Proposition 73. In the wake of Proposition 208's passage, the Commission adopted regulation 18215(c)(16) exempting certain payments from the definition of "contribution" made by sponsors of committees in support of the sponsor's political committee, thus allowing sponsoring organizations to pay for administrative costs benefiting a committee without violating the Proposition 208 contribution limits imposed upon committees. The Commission specifically declined to include fundraising as an exception to the definition of "contribution" in the absence of broad exemption language found in Proposition 73.

In 2000 the voters enacted Proposition 34 which repealed Proposition 208 and imposed new, less stringent contribution limits, on state candidates and committees. Significantly, Proposition 34 re-enacted the language contained in Proposition 73 which allowed committees, including political party committees, to raise funds outside the contribution limits "provided the contributions are used for purposes other than making contributions to candidates for elective state office." This is the language currently found in section 85303(c).

The Commission is now poised to interpret section 85303(c) not as it did when confronted with similar language found in Proposition 73, but instead consistent with regulation 18215(c)(16) adopted after Proposition 208 passed and which has now been repealed by Proposition 34.

In short, the Commission is reversing its interpretation of this statutory language without justification. When the "for purposes other than making contributions" language in Proposition 73 was construed by the Commission, it concluded that fundraising expenses were not contributions. Now that the nearly identical language has been re-enacted in Proposition 34 the Commission is proposing to come to the opposite conclusion.

¹ Staff has argued that Proposition 34's omission of the word "directly" before the words "to candidates" which appeared in Proposition 73's version of 85303(c) is significant and justifies excluding fundraising costs from the meaning of the phrase. However, if that were correct, then the staff should also be excluding all administrative costs associated with supporting a committee's operations. Stated another way, if fundraising is an indirect candidate contribution, then why wouldn't all committee costs be similarly indirect candidate contributions?

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Given the plain and unambiguous meaning of 85303(c) which the Commission correctly understood in 1989 when it issued the *Eldred* letter, it is difficult to understand why the Commission would now decide the statute has a different meaning that actually contradicts the clear statutory language. In reading the *Eldred* letter one is struck by how clear and unambiguous the meaning of the statutory language was. In *Eldred*, the staff was asked if a committee sponsor's payment of certain costs, including development of a fundraising plan, preparation of a fundraising kit, writing a direct mail program for donors and putting on a fundraising event, was subject to the contribution limits for committees or exempt under then section 85303(c). The staff concluded: "by inclusion of Section 85303(c) of the Act, *it is clear* that the drafters meant to exempt some contributions to political committees and broad based political committees from the Act's contribution limits. The Commission staff believes that the in-kind organizational services to be provided by the Society fall within this exemption. These services essentially cover a portion of the committee's overhead and administrative costs and are not something that can be contributed to candidates." (Emphasis added.)

Further, if the Commission were to now adopt the prenotice regulation as drafted, it would not be afforded deference normally afforded regulatory agencies by the Courts. As the California Supreme Court has explained, deference is diminished when an agency changes its mind as to interpretation of a statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13, concluding that an agency's "vacillating position is entitled to no deference.")

The prenotice regulation is inconsistent with the express language of the statute. The Commission has shown no necessity for the regulation as drafted. For these reasons alone the prenoticed regulation should be rejected. As an alternative Mr. Bell's proposed regulation should be adopted.

Very truly yours,

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